BEFORE THE

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Federal Communications Commission

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JAN 25 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

COMMENTS OF LANDMARK COMMUNICATIONS, INC.

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SUMMARY

Section 628 prohibits conduct by a vertically integrated programmer only if it: 1) is an "unfair" or "deceptive" method of competition; <u>and</u> 2) it has a significant harmful impact on competition.

In determining what is an "unfair" or "deceptive" method of competition, the Commission should: 1) rely upon the conduct of non-vertically integrated programmers to provide a standard for assessing the conduct of vertically integrated programmers; 2) apply Section 628 and its implementing regulations prospectively only (no existing contracts should be abrogated, a uniform, across-the-board rate increase may not be the basis for a Section 628 complaint, and complainants only may rely on contemporaneously entered contracts to prove a Section 628 violation); 3) adopt pricing safe harbors, based on absolute price differentials, as well as percentages; and 4) recognize that there are a wide variety of permissible discounts based on the number of subscribers served by a distributor.

The Commission should exempt from Section 628 those entities which cannot possibly create the competitive harm proscribed by Section 628, including: 1) program services for which there are practical substitutes; 2) program services with relatively low penetration; 3) start-up services (including a significant relaunch of an existing service); 4) program services with relatively low viewership; and 5) program services that are vertically integrated with smaller MSOs.

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COMMENTS OF LANDMARK COMMUNICATIONS, INC.

Landmark Communications, Inc. ("Landmark") hereby submits its comments in the above-captioned proceeding.[1] Landmark was formed in 1932 in Norfolk, Virginia, principally to engage in the newspaper publishing business. Today Landmark and its subsidiaries are in the publishing, printing, broadcasting and programming businesses. Landmark's three principal daily newspapers serve a total of approximately 450,000 daily subscribers. Landmark's community newspaper division publishes daily, weekly, tri-weekly and semi-weekly newspapers serving over 235,000 subscribers, as well as shoppers and other publications serving approximately 575,000 readers. Landmark entered the television broadcasting business in 1950 and today, through

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[1] Notice of Proposed Rulemaking in MM Docket 92-265, FCC 92-543 (rel. Dec. 24, 1992) ("Notice").

subsidiaries, operates network affiliated VHF television stations in Las Vegas, Nevada (KLAS), and Nashville, Tennessee (WTVF).

Through subsidiaries, Landmark also owns and operates two basic cable programming services, The Weather Channel and The Travel Channel. The Weather Channel was created by Landmark in 1981 and launched the following year. The Travel Channel was acquired in March, 1992, from a subsidiary of TransWorld Airlines Corporation. Landmark is in the process of substantially redesigning this service. In 1993, The Travel Channel plans to expand its programming budget nearly 900% by purchasing or producing over 550 hours of programming which will be new to the network. This expansion in programming service will result in substantial operating losses which The Travel Channel hopes to offset in the years to come through the introduction of subscriber-based fees, subscriber growth and advertising revenue which will expand as the subscriber base expands.

Neither Landmark nor any of its subsidiaries is currently engaged in the operation of cable television systems. However, in 1964, Landmark formed TeleCable Corporation to enter the cable television business. Commencing with the acquisition in 1964 of the Roanoke Rapids, North Carolina, cable system, TeleCable Corporation grew by acquisitions and development of new franchises. In 1984, TeleCable Corporation ("TeleCable") was spun off from Landmark and as a result became a separate company rather than a Landmark subsidiary.[2] Today, TeleCable and its subsidiaries operate twenty-one cable systems in fifteen states, serving approximately 685,000 subscribers.

I. Introduction

Landmark believes the provisions of the Cable Television Consumer Protection and Competition Act of 1992 (the "Act")[3] dealing with program distribution policies (commonly referred to as "program access") have the potential to significantly disrupt the cable television programming marketplace, causing substantial harm to programmers, distributors, and, ultimately, consumers. In order to avoid this result, Landmark urges the Commission, consistent with well-established principles of competitive analysis, to interpret all aspects of Section 628 in light of the requirement in subsection (b) that a programmer's conduct is only proscribed if it significantly harms competition. In applying this overarching principle, the Commission also should recognize that:

1) Practices that are common to competitive markets should not be prohibited. Congress intended the Act to foster a

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[2] Both Landmark and TeleCable are privately held. Each has two classes of common stock, voting and non-voting. The voting stock has the exclusive right to elect the Board of Directors. No single shareholder owns a majority of the voting stock. However, Frank Batten, through shares he owns and shares held in a testamentary trust, has the right to vote a majority of the voting shares of both Landmark and TeleCable.

[3] 47 U.S.C. Secs. 548 and 536.

competitive marketplace for cable television. Indeed, Congress expressed its preference to "rely on the marketplace, to the maximum extent feasible."[4] In particular, prohibiting practices that are routinely used by entities which are not vertically integrated and which operate in the same competitive market would not only be injurious to programmers and distributors, it would contravene Congressional intent.

2) The program access provisions were designed to reach program services that have sufficient size and scope to significantly harm competition. This is clear from the legislative history[5] and the language of the Act, requiring that a programmer's conduct must be shown to "hinder significantly" or "prevent" competition before it violates Section 628. Program services that do not have sufficient size and scope, by definition, cannot have that impact on the marketplace. The Commission will contribute significantly to marketplace certainty and, at the same time, reduce its administrative burden, by establishing criteria for identifying entities that, because they cannot have the proscribed effect on competition, are outside the scope of Section 628.

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4 Section 2(b)(2) of the 1992 Cable Act.

5 Senate Report No. 92, 102nd Cong., 1st Sess., 14-15, 24 (1991) ("Senate Report").

II. <u>In Order for Conduct to Be a Violation of Section 628, It Must Be Proved to Significantly Harm Competition in the Marketplace</u>

Section 628(b) prohibits vertically integrated program services from engaging in "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."[6] The plain language of this section, as well as the legislative history,[7] make clear that there is a two-part test which must be met before any conduct by a vertically integrated programmer will be deemed a violation of Section 628:

1) the conduct must be an "unfair" or "deceptive" method of competition; and

2) it must have a significantly harmful effect on competition in the marketplace.

Section 628(c) is not inconsistent with this interpretation. Subsection (c) requires the Commission to promulgate certain

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6 47 U.S.C. Sec. 548(b).

7 <u>See, e.g.</u>, H.R. Conf. Rep. No. 862, 102nd Cong., 2d Sess. 92-93 (1992) ("Conference Report"); Senate Report at 24; 138 Cong. Rec. H6533 (daily ed. July 23, 1992) (statement of Cong. Tauzin); 138 Cong. Rec. H6541 (daily ed. July 23, 1992) (statement of Cong. Harris); 138 Cong. Rec. S736-737 (daily ed. Jan. 31, 1992) (statement of Sen. Gore).

regulations to "specify particular conduct <u>that is prohibited by subsection (b)</u>."[8] Thus, the subsection (c) regulations are subordinate to the principal prohibition in subsection (b). The subsection (c) regulations must not only be limited to acts or practices by vertically integrated programmers that are "unfair" or "deceptive" methods of competition, they also must be limited to acts or practices that significantly harm competition in the marketplace.

This interpretation of the relationship between subsections (b) and (c) is confirmed by the history of the program access debate. In the years immediately following passage of the 1984 Cable Act, some programmers were reluctant to authorize widespread distribution of their services by non-cable distribution technologies. These programmers expressed legitimate concerns with the financial stability and technical capability of technologies such as multipoint distribution service (which was experiencing marketplace setbacks) and home satellite dish systems (that were in the very early stages of their development). Nonetheless, some members of Congress advocated legislation imposing on programmers a broad "duty to deal" with rigorous price regulation.

As alternative distributors began to demonstrate in the late 1980s that they were financially and technologically viable, programmers increasingly began to authorize them to distribute their services. In fact, as the Commission has noted, by 1992

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8 47 U.S.C. Sec 548(c)(1).

when the Act was passed, most cable satellite program services were available for distribution by non-cable providers.[9]

As the marketplace evolved, Congress' view of program access evolved, as well. When Congress finally passed legislation, it adopted the more traditional approach to competitive analysis which requires significant harm to competition as a fundamental condition for regulatory intervention.

III. In Determining What is "Unfair" or "Deceptive" Within the Meaning of Subsection (b), the Commission Must Not Bar Acts or Practices That are Legitimate and Common in Competitive Marketplaces

The Commission correctly points out in the Notice that it should not preclude "legitimate business practices common to a competitive marketplace."[10] In passing the Act, Congress sought to have the cable industry operate in a competitive environment. Congress' specifically designed the Act to "protect consumers by ... sparking the development of a competitive marketplace."[11] Thus, to ban common marketplace practices that

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[9] See Inquiry into the Existence of Discrimination in the Provision of Superstation and Network Station Programming, 5 FCC Rcd 523, 531 (1989); Inquiry into the Scrambling of Satellite Television Signals and Access to Those Signals by Owners of Home Satellite Dish Antennas, 3 FCC Rcd 1202, 1208-1211 (1988).

[10] Notice at para. 1.

[11] See H.R. Rep. No. 628, 102nd Cong., 2d Sess. 26 (1992) ("House Report"); See also House Report at 44; Conference Report at 93.

do not injure competition would directly contravene Congressional intent.

In promulgating regulations under Section 628, the Commission will be required to make judgments about which types of acts or practices Congress intended to prohibit. Clearly, Congress did not intend to ban all acts or practices by vertically integrated programmers that result in price differentiation between distributors. Congress recognized that vertical integration can produce economic efficiencies that promote consumer welfare.[12] The Commission itself has recognized this fundamental precept in the Notice.[13]

Thus, the Commission will have to distinguish between differentiation that does not harm marketplace competition pursuant to Section 628(b) and anti-competitive discrimination that should be barred under that Section. Of course, there are many factors that are relevant in making such distinctions, some of which are identified in the Notice.

Landmark recommends the following guidelines that it believes will substantially assist the Commission in developing rules that satisfy Congressional intent, without disrupting the marketplace: A) the Commission should look at the practices of non-vertically integrated programmers as a standard for determining whether a vertically integrated programmer violates Section 628; B) as a matter of legal and public policy, Section

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12 See House Report at 41; Senate Report at 24-29.

13 Notice at para. 15.

628 and the regulations promulgated thereunder should be applied prospectively only; C) establishing certain pricing benchmarks that would constitute a "safe harbor" would contribute to marketplace certainty; and D) there are a variety of discounts related to the number of subscribers provided by a distributor that produce significant benefits for programmers and consumers that should be permissible under Section 628.

A. The Commission Should Use the Conduct of Non-Vertically Integrated Programmers as a Standard for Assessing Vertically Integrated Programmers Under Section 628

It is clear from the plain language and legislative history of the Act that the focus of Section 628 is vertical integration.[14] Because non-vertically integrated programmers are outside the scope of Section 628, Congress must have believed the practices of such programmers were not a cause for concern. Had it believed otherwise, it would have included non-vertically integrated programmers in Section 628.

Consequently, it is appropriate that in assessing whether acts or practices of vertically integrated programmers violate Section 628, the Commission look to the conduct of non-vertically integrated programmers. If a vertically integrated programmer's practices are substantially similar to those of a non-vertically

14 See Sections 628(b) and (c); see also supra note 12.

integrated programmer, those practices should be presumed lawful. Such a standard not only would be appropriate, it would be administratively convenient and would enhance marketplace certainty and stability.

Likewise, Landmark believes Section 628 should only apply in areas where a programmer is actually vertically integrated, i.e., in markets where it has common ownership with the cable operator. This is the only area where the conduct Congress was concerned with can occur. Clearly, where a programmer has no ownership interest or other control of a distributor in a particular market, there can be no anticompetitive conduct as a result of vertical integration in that market. It would be illogical to apply Section 628 in such circumstances.

B. Section 628 and the Commission's Regulations Should Be Applied Prospectively Only

In paragraph 27 of the Notice, the Commission inquires whether its regulations to implement Section 628 should be applied retroactively. Landmark strongly believes that the rules may not be applied retroactively.

The Supreme Court has made it abundantly clear that "[r]etroactivity is not favored in the law."[15] Moreover, administrative agencies may not apply federal legislation

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[15] Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988).

retroactively unless it is clear that Congress intended such a result: "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."[16]

The Commission has already found in the Notice that Section 628 "is silent concerning enforcement of anti-discrimination rules with respect to existing contracts."[17] Thus, the Commission's tentative conclusion that "any pricing policies or restrictions developed to implement Section 628 should not be applied retroactively against existing contracts,"[18] is correct and mandated by Supreme Court precedent.

Landmark fully supports the Commission's conclusion that its rules under Section 628 should not have the effect of abrogating existing contracts. In addition, the Commission should not permit its rules to be applied retroactively so as to allow a complainant to use a contract entered into before the Act as a basis for proving a contract entered into after the Act violates Section 628. To do so would not only be contrary to the legal precedent cited above, it would be patently unfair. Contracting parties may not be held to knowledge of the law at a time when the law is not susceptible to knowledge.[19] Had the parties

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16 Id. (emphasis added).

17 Notice at para. 27.

18 Id.

19 See Singer, Sutherland Statutory Construction, Sec. 41.02 (Sands 4th ed. 1992).

known that the terms of the contract would be used for comparison to determine the reasonableness of future contracts, they may well have insisted on different terms that were flexible enough to account for future developments. This is particularly the case in a dynamic business such as video program distribution.

The same analysis can be applied to the Commission's rules to implement Section 628. Parties cannot know the full impact of the rules until they are made public by the Commission. Therefore, contracts entered into before the effective date of the rules are not appropriate benchmarks against which to measure future contracts.

The Commission also should recognize that a programmer's adoption and uniform implementation of a new rate card (which might implement either rate increases or decreases) should not be the basis for new complaints under Section 628 unless the new rate card itself calls for improper discrimination. For example, if a programmer institutes a new rate card with a rate increase, such action should not enable distributors who are subsequently offered program carriage agreements under the new rate card to complain under Section 628 by comparing their rates to those in effect prior to the new rate card. The Commission can prevent use of the rate card to evade Section 628 by explicitly prohibiting such manipulation as evidenced by, for example, frequent rate card changes over a relatively brief period of time.

Similarly, only disparities between contemporaneously entered contracts should be subject to attack under Section 628. Landmark believes that complainants should be limited to comparison with contracts entered into within six months of each other. Any other approach would be unfair and likely to produce severe economic anomalies. For example, a complainant should not be able to allege that its 1997 contract with a particular programmer violates Section 628 because the terms are less favorable than those in a contract between the programmer and another distributor entered into in 1994.

Landmark believes that Commission regulations consistent with the above are necessary to protect programmers and distributors from unnecessary disruption of contracts entered into in good faith pursuant to then relevant legal, regulatory, and marketplace conditions. Prior to adoption of the Act, Landmark's services had entered into numerous long-term contracts relating to programming, satellite distribution, marketing and other matters in good faith reliance on the continued enforceability of its current contracts with cable operators and other program distributors. Although limiting application of the rules to contracts entered into after their effective date theoretically allows parties to attempt to avoid the effect of the rules by entering into contracts in the interim period, Landmark believes such efforts are extremely unlikely.

However, if the Commission is concerned about such a possibility, it could simply prohibit actions designed in bad faith to avoid the rules. It could also develop criteria for determining when certain conduct should result in an inquiry to determine if it constitutes a bad faith evasion of the rules. For example, if a contract is renewed at an unusual time, e.g., a seven-year contract is renewed after four years and right before the effective date of the rules, it might be reasonable for the Commission, in response to a complaint, to inquire into the reasons for such renewal.

Thus, the Commission could protect against evasions of the rules and, at the same time, ensure that programmers and distributors are not unnecessarily harmed by retroactive application of the rules. At any rate, this is a very short term phenomenon (lasting only until April 1, 1993, when the Commission is required to issue rules) and there are likely to be very few, if any, instances in which evasions are at issue. Therefore, the Commission should not base its decision on retroactivity on the possibility of such evasions.

Landmark urges the Commission to conclude that complaints challenging the reasonableness of future contracts under Section 628 should be based upon evidence concerning contracts that:

1) are entered into after the effective date of the Commission's rules;

2) are unrelated to any general, across-the-board rate increase; and

3) are entered into contemporaneously (as defined above) with the complainant's contract.

C. <u>The Commission Should Adopt Pricing Benchmarks That Constitute a "Safe Harbor"</u>

In paragraphs 19-23 of the Notice, the Commission proposes standards for identifying pricing practices that would be presumptively lawful under Section 628. Landmark fully supports this approach and believes it would contribute significantly to programmers and distributors better understanding their rights and obligations under Section 628.

Pricing benchmarks would be particularly important for a programmer like Landmark which provides high quality services at a relatively low cost. The disparity between Landmark's lowest and highest wholesale rate to different distributors is only a few cents. While such a price difference cannot have a significant effect on competition, it can have a meaningful impact on Landmark's ability to successfully market its services. Such small absolute price differences are justified on the basis of differences from customer to customer in Landmark's expenses related to marketing, promotion, customer service and other similar matters. Landmark, like other relatively low cost programmers, needs flexibility to structure its pricing policies without fear that any reasonable price differential will subject it to detailed and costly scrutiny under Section 628.

Landmark favors Option One, described in paragraph 20 of the Notice as the most effective way of accomplishing this goal. Option One would essentially create a safe harbor. If a programmer's wholesale price to a distributor is within a certain range of its lowest price to any other distributor, then the programmer should not be subject to a Section 628 complaint. The range must be set with reference to the Section 628(b) requirement that the programmer's action significantly harm competition. It is not enough that a complainant distributor is unhappy about paying a higher price than another distributor. There are numerous reasons for differentiated pricing that are grounded in economic efficiency and have nothing to do with an effort to use vertical integration to disadvantage a rival distributor. Thus, the Commission should establish a relatively broad range that allows for disparate pricing that does not "hinder significantly" or "prevent" competition pursuant to Section 628(b). As noted above, the Commission generally can look to the practices of non-vertically integrated programmers as a gauge for establishing the appropriate range of this safe harbor.

Landmark believes there are two specific methods the Commission could utilize in determining whether a programmer qualifies for the safe harbor. The Commission could create a safe harbor range based on an absolute price differential. Landmark favors this approach because a price difference that is small in absolute amount can have, at most, a very small effect on competition. For example, if a programmer charges Distributor A five cents and Distributor B 10 cents, there would be, as a result of this pricing, little impact on prices to consumers.

Thus, the programmer's pricing would confer little ability on Distributor A to exercise increased market power and, therefore, it should be outside the scope of Section 628.

The Commission also could calculate the safe harbor based on a percentage difference in a programmer's pricing. Thus, if a programmer's price to Distributor A is no more than a specified percentage greater than its price to Distributor B, Distributor A may not use Distributor B's price as a basis for a Section 628 complaint. The Commission must recognize, however, that a percentage calculation may produce anomalous results if applied to all fact situations.

Consider the following examples if the Commission were to establish a safe harbor based on a 25% range:[20]

1) A programmer charges Distributor A $1.00. It charges Distributor B $1.20. The price to distributor B is within the 25% range, qualifies for the safe harbor, and is presumed lawful.

2) A programmer charges Distributor A 4 cents. It charges Distributor B 10 cents. The price to distributor B is not within the 25% range and therefore does not qualify for the safe harbor.

In the first example, the programmer's pricing requires that Distributor B pay 20 cents more than Distributor A. In the second example, the programmer's pricing requires Distributor B to pay 6 cents more than Distributor A. It is likely that the

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[20] The 25% figure used in this example is for demonstration purposes only and does not necessarily reflect Landmark's view of the appropriate percentage for the safe harbor.

impact of the programmer's pricing on Distributor B's ability to compete is less in the second example than in the first example. Yet, the programmer's pricing in the first example qualifies for the safe harbor and in the second example it does not.

To avoid this potential anomaly, the Commission must include in the structure of the safe harbor not only an acceptable percentage differential, but also a range based on the absolute differential as described above.

D. <u>Section 628 Permits a Wide Variety of Pricing Discounts Based on the Number of Subscribers Served by a Distributor</u>

Section 628(c)(2)(B)(iii) permits a vertically integrated programmer to establish "different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor."

Landmark believes this subsection allows programmers to continue to provide volume discounts. Volume discounts are a common practice found in many segments of the video production and distribution businesses, as well as numerous other businesses. Such discounts not only produce economic benefits for programmers and distributors, but for consumers, as well. Because a distributor experiences lower prices as a result of volume discounts, its subscribers can obtain more services and services at lower prices.[21]

In addition, Section 628(c)(2)(B)(iii) permits a variety of other discounts that are not volume discounts in the traditional sense, but are "related to the number of subscribers served by the distributor." It is often in a programmer's interest to provide discounts that encourage a distributor to more aggressively market and sell its services. Such discounts can take a variety of forms, such as performance discounts based on substantial or increased penetration for the programmer's service, discounts for offering the service on basic (or another highly penetrated tier) where it is likely to be seen by more subscribers, and discounts which recognize the distributor's ability to serve subscribers that are particularly valuable from an advertising standpoint (e.g., the subscribers are in an important market for advertisers). All of these discounts are ultimately designed to extend the reach of the programmer's service and therefore are related to the number of subscribers served by the distributor. In addition, these discounts produce benefits for programmers, distributors and consumers comparable to those which result from volume discounts.

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[21] Landmark believes the Commission should not require programmers to deal with buying co-ops since, in its experience, co-ops do not provide the benefits of dealing with a single entity. See Notice at para. 26. At the very least, if co-ops are to be dealt with as MSOs, they should be required to act like MSOs, including providing joint and several liability.

The language and legislative history of Section 628 support the view that these discounts are permissible under subsection (c)(2)(B)(iii). Although Section 628 is based on the House bill version of program access,[22] the discount provision in subsection (c)(2)(B)(iii) was taken from the Senate bill.[23] However, when the Conference Report adopted the Senate version of the discount provision, it added the phrase "or other direct and legitimate economic benefits." The legislative history provides no explanation for this addition, but the language of the phrase suggests that it was meant to enlarge the scope of the subsection. Landmark submits that Congress took this step because it recognized that "discounts related to the number of subscribers served by a distributor" included legitimate and common discounts, such as those described above, other than traditional volume discounts.

IV. The Commission Should, Consistent With Congressional Intent, Exempt From Section 628 Certain Entities That Could Not Have the Impact on the Marketplace Proscribed by Section 628(b)

The legislative history of Section 628 makes clear that it was intended to regulate the conduct of programmers with substantial vertical integration.[24] Landmark notes, for

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22 See Conference Report at 73.

23 See Senate Report at 121.

24 Id. at 14, 24.

example, that the Senate Report indicates that The Weather Channel is not a vertically integrated company for purposes of the program access provision.[25] Whatever attribution rule the Commission uses to define vertical integration, however, Landmark believes the Commission must consider other relevant factors in assessing whether a programmer is within the scope of Section 628. Focusing solely on attribution is insufficient and will have the result of including entities within Section 628 which could not have the effect on competition necessary to trigger Section 628.

To avoid discouraging innovation by newer and smaller programmers and to avoid the burden and expense of frivolous complaints, the Commission should expressly exempt from the scope of Section 628 several categories of vertically integrated program services: (1) those for which there exist close substitutes (defined in terms of ability to generate similar levels of net revenue for a program distributor); (2) those that are in their start-up or developmental stage; (3) those that, by virtue of low penetration (in terms of subscriber households), can safely be presumed not to be competitively necessary for any multichannel video programming distributor; and (4) those whose vertical integration arises from common ownership with relatively small MSOs.

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25 Id. at 25.

1. Availability of practical substitutes for the programs of vertically integrated programmers. Insofar as the viability of a multichannel video program distributor is concerned, the value of a program is measurable in terms of the net revenues that it produces for the distributor. Thus, conduct by a vertically integrated programmer that restricts or denies the availability of a program to a distributor can be competitively significant only if the affected program distributor does not have access to substitute programming capable of producing similar net revenues for the distributor. For the vast majority of vertically integrated pay and advertiser-supported cable program services, there exist one or more other services having similar revenue-generating potential. The Commission should, therefore, provide a safe harbor for all vertically integrated program services for which reasonable substitutes -- measured in terms of ability to generate net revenues for a distributor -- exist. As a general matter, the Commission should assume the existence of adequate substitutes for any programming which has low penetration or which has viewership below a reasonably defined level. By way of reference, The Weather Channel currently has an average daily rating of .2, according to Neilson, and Landmark projects a similar rating for The Travel Channel.

2. Services with relatively low penetration. Simple arithmetic compels the conclusion that viable substitutes exist for any cable programming service that has achieved less than 50